Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

David Fichtenberg, Petitioner, pro se

vs.

Federal Communications Commission and the United States of America, Respondents

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On Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1997 the Federal Communications Commission ("FCC") concluded a rule making in the matter of Guidelines for Evaluating the Environmental Effects of Radiofrequency ("RF") Radiation and adopted certain statutes preempting local regulation of RF exposure. FCC addressed RF exposure from cellular phone, cellular towers and other RF sources. On health related matters FCC said it would generally defer to its advising federal health agencies. Some comments in the record, particularly, public comment on health related topics, including those submitted under 47 U.S.C. 405 (Petition for Reconsideration) were not given meaningful consideration by any party because FCC said it could rely on its advising expert federal agencies.

1. EXCLUSION OF CONSDERATION OF PUBLIC COMMENT:

Whether, under the Administrative Procedures Act (APA), National Environmental Policy Act (NEPA), and statute 47 U.S.C. 405 (Petition for Reconsideration to FCC), lead agencies in a rule making on a matter in which they are not expert and where they defer to advising expert agencies and technical committees, may avoid assuring meaningful consideration of comments in the record. particularly public comment, when such comment would lawfully be required were the advising expert agencies issuing a similar rule making?

2. REVERSING POLICY OF MINIMIZING RF EX-

POURE TO CELLULAR PHONES AND TOWERS:

Whether FCC exercised its lawful discretion under APA, NEPA, and 47 U.S.C. 405, when in its new RF guidelines, FCC did not follow Congressional policy in 47 U.S.C. 324 requiring that exposure to RF power be minimized, when FCC did not explain why it reversed and rejected its previous policy of requiring its licensees to keep RF radiation exposure from their facilities and devices as low as reasonably achievable, and when FCC extended such requirement during a transition period?

3. FCC DOING THE 'FUNCTIONAL EQUIVALENT' OF NEPA REQUIREMENTS

Whether lead agencies who are not expert in the on health or environmental impact of the matter of their rulemaking, may define some 'functionally equivalent' procedures to NEPA to follow and so avoid their formal NEPA requirements?

4. PROPER DELEGATION OF AUTHORITY TO FCC?

Whether Congress may delegate authority to preempt State and Local public health and safety regulations to an agency, such as the preemption authority granted to the FCC in 47 U.S.C. 332(c)(7)(B)(iv) or in 47 U.S.C. 253(b), when that agency does not have expertise in that public health or safety matter?

5. ARE HEALTH EFFECTS PART OF ENVIRONMENTAL EFFECTS?

Whether the FCC may apply typical agency discretion to resolve ambiguous statutory terms and imply from 47 U..S.C. 332(c)(7)(B)(iv) its preemption of local public health and safety regulations pertaining to the siting, use, and operation of cellular towers and other wireless facilities on the basis of "health effects" of RF radiation from such facilities, when the Telecommunications Act of 1996 (TCA) prohibits implied preemption, only preempts the undefined term "environmental effects", provides in TCA Sec. 253(b) for State regulations protecting the public safety and welfare even if it may create barriers to entry of FCC licensed services, and when FCC does not have expertise in RF health matters?

6. PREMPTION OF LOCAL REGULATIONS PROTECTING THE ENVIRONMENT AND HEALTH

Whether Congress, by preempting local land use cellular phone tower RF exposure regulations to protect the environment (or the public health - if FCC interpretation is adopted), has de facto forced jurisdictions to comply by leaving them no real choice, or to be compelled if they refuse, has commandeered legislative processes of the states to administer a federal program, in violation of the Tenth Amendment as described in New York v. United States, 505 U.S. 144 (1992)and Printz v. United States, 521 U.S. 898 (1997)

LIST OF PARTIES

Petitioners

All parties in the proceeding below do not appear in the caption on the cover page of this petition.. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Cellular Phone Taskforce, Ad-Hoc Association of Parties Concerned About the Federal Communications Commission Radio Frequency Health and Safety Rules; David Fichtenberg; Citizens for Appropriate Placement of Telecommunications Facilities; John Bardis; Erica Zweig, Christopher Beaver, of Noe Valley Families Against the Antennas; Major Belkin; Donna Casey; Maggie Fox; Eileen Lahey; Mark R. Shirely; M. Sue Storm, of Healthy Home Alliance; Joseph Bohacz; Candice Brown; Gary Brown, of Families for Appropriate Cellular Tower Siting; Susan Clarke, of Environmental Health Advocacy League; Mary-Croughan Minihane; Libby Kelley; Silvia M. Siegel; Annegret C. Topel, of Citizens of Marin for Sensible Communications Planning; Jerry Davis; Jean Foley, of Ulysses Citizens for Responsible Technology; Holly A. Fournier, Selectboard member of Charlotte, VT and co-chair of Citizens for Appropriate Placement of Telecommunications Facilities; Julianna Free, of Lifetime Resources, Inc.; Anne Galloway, of Hardwick Action Committee; David Gell; Richard Gianattiasio, of Northboro Residents for Responsible Tower Siting; Dale A. Newton; Janet R. Newton; Bernard Greenberg; Laridna A. Knowlton; Roger Knowlton, of Thistle Hill Neighborhood Alliance; Cathy Bergman-Venezia; Frank Goodrich; Andrew J. Hillman; Marija Huges; Mark Hutchins; Ralph E. Munston, of EMR Alliance; Julie E. Jordan, of Coalition of Concerned Citizens For Responsible Technologies; Jeannine Karlsson, Commissioner of Town of Bedford Conservation Board; Patricia Kelley; S.G. Lawrence; Emery Lazar; Dawn Mason; Dorothy Miller, Advisory Neighborhood Commis-

sioner; Edward Steinman; Peter De Pippo; Michael Worsham; The Communications Workers of America, AFL-CIO; CWA Local 7810; Rainer Waldman Atkins; Alan Golden; Virginia J. Moore-Ward; Faye Mueller-Hebert; Patricia Vaughey; Bill Jenkins; and Council of Washington State CWA Locals.

Other Respondents are the Federal Communications Commission and The United States of America.

And Respndent Intervenors are the Cellular Telecommunications Industry Association, National Association of Broadcasters, Association for Maximum Service Television, Inc. Electromagnetic Energy Association, and AT&T Wireless Services, Inc.

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APPENDIX A

See Appendix A submitted with a Petition for Writ of Certiorari in behalf of Citizens For The Appropriate Placement Of Telecommunications Facilities et al., by counsel Whitney North Seymour and Peter J. Clines of the law firm Landy & Seymour, and submitted to the proceeding in the court whose judgment is the subject of this and their petition

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Table of Authorities Cited

Cases

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vs. State Farm Mutual

New York v. United States,
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Printz v. United States,
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Cellular Telephone Co. v.
Town of Oyster Bay,
166 F.3d 490 (2nd Cir. 1999)

Iowa Wireless Services, L.P.
v. City of Moline, Ill
29 F.Supp. 915 (C.D.Ill 1998)

Omnipoint Corp. v.
Zoning Hearing Bd.
of Pine Grove, TP

20 F.Supp. 2d 875,
881-92 (E.D. Pa. 1998)

Illinois RSA No. 3 v.
County of Peoria, 965 F. Supp.
732, 747, (C.D. Ill. 1997)

BellSouth Mobility Inc. v
Gwinnett County Georgia,
944 F. Supp. 923, 929 (N.D. 1996).

Statutes and Rules

28 U.S.C Sec. 1254(1)
47 U.S.C. 405

47 U.S.C 324

47 U.S.C. 332(c)(7)(B)(iv)

Telecommunications Act of 1996
Sec. 253(b)
Sec. 601
Sec. 704

Rule and Order in ET-Docket 93-62,
reported in
Notice FCC 96-326
found at 11 F.C.C Rcd 15123 (1996)

Second Memorandum Opinion and
Order in ET-Docket 93-62
Found at
12 F.C.C. Rcd 13494(1997)

Other:

ANSI C95.1-1982 RF standards

ANSI C95.1-1992 RF standards

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS AND JUDGMENTS BELOW

On August 1, 1996 the Federal Communications Commission ("FCC") released its final order Report And Order ("R&O") regarding FCC ET Docket 93-62 in the matter of Guidelines for Evaluating the Environmental Effects of Radiofrequency Emissions ("RF Guidelines"). This was reported in FCC Notice 96-326 and at 11 F.C.C. Rcd. 15123 (1996). On August 25, 1997, FCC released notice FCC 97-303 which contained its second final order on this matter and is reported at 12 F.C.C. Rcd 13494 (1997).

The original opinion of the United States Court of Appeals for the Second Circuit which reviewed the above orders is reported as Cellular Phone Taskforce v. FCC, 205 F.3d 82 (2nd Cir. 2000). It is reproduced at Appendix A-1, in the Appendix A submitted with a Petition for Writ of Certiorari by counsels Whitney North Seymour, Jr. and Peter J. Clines of the law firm Landy & Seymour in behalf of Citizens For The Appropriate Placement of Telecommunications Facilities and other parties to the above Court of Appeals proceeding whose judgment is the subject of this and their petition ("App. A"). The Opinion by the Second Circuit denying the petition for rehearing by the Cellular Phone Taskforce ("CPT") is reproduced at App. A-23.

The Opinion by the Second Circuit denying the petition for rehearing by the Communications Workers of America is electronically reported at 2000 WL 862305 and reported herein at A-26.

Because of their voluminous nature, copies of the above FCC Orders have been lodged with the Clerk of this Court in conjunction with the above mentioned Petition for Writ of Certiorari submitted by the law firm Landy & Seymour. Also because of their voluminous nature, standards referenced in 47 CFR 1.1307(b)(4)(i) and (ii) that the First Final order established to apply during a transition period are also lodged with the Court as well FCC OST Bulletin No. 65 and OET Bulletin No. 65 that describe how compliance with the standards in 47 CFR 1.1307(b)(4)(i) and (ii), respectively, may be met.

JURISDICTION

On February 18, 2000, the Court of Appeals affirmed the above two challenged final orders of the FCC, in which it upheld the validity of the statutory and regulatory provisions in question. The Court of Appeals denied the timely filed petition of Cellular Phone Taskforce on June 6, 2000 (A-23), and denied the timely petition for rehearing by the Communications Workers of America on June 15, 2000 (A-26). Pursuant to Supreme Court Rule 13, this petition is timely filed within 90 days of that latter petition. This Court has jurisdiction under 28 U.S.C. Sec. 1254(1).

Standing of Petitioner:

Mr. Fichtenberg has a Master of Biostatistics and Master of Public Health degree from the University of

California at Berkeley. He has participated in the FCC rule-making proceeding below with his earliest letter dated December 10, 1995 raising concerns about adverse health effects from RF radiation and proposing FCC RF regulation changes. It is in the FCC record of this proceeding. [See Second Ciruit Joint Appendix ("JA") at 578]. In September 1996, he submitted on behalf of Ad-Hoc Association an accepted Petition for Reconsideration to the FCC pertaining to its First Order [JA 890] and subscribed to it in behalf of the (State of) Washington Council For Safe Wireless Technology [JA 901].

In the above Petition, Mr. Fichtenberg noted his children attended a school, Northwest Yeshiva High School on Mercer Island, Washington on whose property a cellular tower was to be erected [JA 909]. Subsequently, the cellular tower was erected within 20 feet of the school's property and is there now. As a donor, past member of its Education Committee, and member of the school's community organization, Mr. Fichtenberg seeks to educate the school's leaders of the possible health risks and structural modifications to attenuate the signal that he believes should be considered. He is harmed in these efforts because the leaders rely on the FCC's findings that "There is no evidence to suggest that transmitters or facilities that comply with our guidelines will cause adverse health effects." [Notice FCC 97-303, par. 111]. Had the FCC had the studies and the analyses Mr. Fichtenberg submitted to the FCC been evaluated by those with expertise in RF health matters, it is very likely the FCC would have been informed the opposite of its conclusion is true. A favorable decision by this Court that such comment should be considered will make Mr. Fichtenberg's efforts to protect his school easier.

Mr. Fichtenberg does not visit his friend, Boris

Makovoz (who lives in a second floor apartment at 5111 South Dawson, Seattle, Washington, 98118) as often as Mr. Fichtenberg would like, nor does he stay for such visits as long as he would like. This is because there is a wireless telecommunications facility on the roof-top of a one story retail business adjoining Mr. Mokovoz's apartment. This facility approximately the same height of Mr. Makovoz's appartment and within 25 feet of it. As a result, microwave radiation close to the main beam of the transmitter may irradiate through a large glass window into Mr. Makovoz's apartment. I believe that a favorable decision by this court will increase the chance that the apartment owner will be made aware of the need to keep exposure as low as reasonably achievable and so take measures to attenuate the signal. Mr. Fichtenberg would then visit his friend more often and stay longer.

Mr. Fichtenberg rides to work in a vanpool and also rides public transit regularly each month where he is exposed within 3 feet of users of cellular phones. Had the FCC adopted the ALARA policy, it would be easier for him to convince others not to use a cellular phone so close to his person. Also, he lives within 400 feet of wireless telecommunications transmitters on a roof-top in a valley along which is a commercial street.. His hillside home is about the same vertical level as the transmitters and so he is exposed to its horizontal main beam. Had the ALARA policy been adopted by FCC, it is possible that alternative sites near the tops of hills, instead of in a valley could have been selected for the transmitter, thereby reducing his RF exposure. If the FCC will adopt ALARA, then it will be easier for Mr. Fichtenberg to seek a re-location of the transmitters.

Mr. Fichtenberg has been spokesperson for Ad-Hoc Association of Parties Concerned About the Federal Com-

munications Commission Radiofrequency Health and Safety Rules ("Ad-Hoc Association") since it formed shortly before he filed with the FCC a Petition for Reconsideration in behalf of Ad-Hoc Association and which was subscribed to by other parties. Note that some other parties subscribing to this September 1996 Petition for Reconsideration to the FCC, such as Cathy-Bergman-Venzia, at Second Circuit Joint Appendix ("JA") 905, JA 0914, and Marija Hughes at JA 906, as well as at JA 0915 and 6038-6060 (where she describes how she has been affected by RF radiation) are now petitioners in the Petition for Writ of Certiorari noted above submitted by counsels Whitney North Seymour, Jr. and Peter J. Clines.

As President of Ad-Hoc Association Mr. Fichtenberg was on its founding Board when it registered with the State of Washington as a non-profit organization (Uniform Business ID # 601-796-186) on June 6, 1997 (App. C). It continues to be a duly authorized Washington non-profit corporation (App. C). Section #4 of the Articles of Incorporation of Ad-Hoc Association describe its mission which Mr. Fichtenberg seeks to carry out, as part of his duties as President. His duties include carrying out the Ad-Hoc Association mission of:

> "educating and informing workers and the public about the biological, health, safety, and environmental effects and legal issues associated with NIER (non-ionizing electromagnetic fields."

To achieve this mission, Mr. Fichtenberg spoke, for example, at a forum in a hearing room of the U.S. Senate in March 1999, and as recently as August 2000 spoke on an Indiana radio show on why the FCC conclusions are inadequate. As spokesperson for Seattlites for Appropriate Antennas in our Neighborhoods (SAANE), he led a legal challenge of the adequacy of proposed City of Seattle tele-

communications amendments, and is now in discussions with the City of Seattle on this matter.

In November 1996, Mr. Fichtenberg, the Ad-Hoc Association and several other parties submitted Petitions for Judicial Review to the United States Court of Appeals. (see List of Parties naming Mr. Fichtenberg in proceeding below). In the Principal and Reply Brief of Ad-Hoc Association in which Mr. Fichtenberg joined in submitting to the Second Circuit (see App. C-3), Mr. Fichtenberg challenged as arbitrary certain FCC discretionary decisions as well as challenging that FCC exceeded its statutory authority or that the statute it relied upon to preempt local public health RF regulations were unconstitutional.

All of the Questions Presented above by Mr. Fichtenberg pertain to issues that were raised in the challenged FCC proceeding below and before the proceeding before the Untied States Court of Appeals For The Second Circui. The FCC decisions associated with these questions adversely affect Mr. Fichtenberg and a favorable decision by this Court would give Mr. Fichtenberg relief. So these Questions Presented have standing to be considered in this Petition for Writ of Certiorari. Specifically:

- The issue of whether the Commission should have sought a response from its advising federal health agencies to the requests to modify the FCC rules based on RF health considerations was discussed in the record in the Ad-Hoc Association et al. Petition for Reconsideration to the FCC ("AHA Recon.") (JA 0878-0879, Item 5, "Considering views of health agencies"). FCC notes this Ad-Hoc Association request (Notice FCC 97-303, par. 25) and describes why it did not ask its advising federal health agencies for advice on how to respond to the requested modifications of Ad-Hoc Association at

FCC Notice 97-303, Par.#29-39. It was raised in the Ad-Hoc Association et al. brief Mr. Fichtenberg joined (DF Brief) at ?? and discussed in the Opinion at A-??

- The question of whether the FCC should adopt the requirement that exposure be "as low as reasonably achievable" (ALARA), was raised in the FCC proceeding in the AHA Recon. at 18, and by Mr. Fichtenberg comments to FCC of Oct. 8, 1996 (JA 1018). FCC notes this at FCC 97-303, par #25. It is discussed in the Opinion at A-.??

- Whether FCC met its NEPA requirements is raised throughout the petitions for reconsideration of Ad-Hoc Association and Cellular Phone Taskforce.

- Whether 'health effects' are within 'environmental effects' regarding FCC preemption authority over the siting and operation of FCC licensed facilities is raised at AHA Recon at JA 887-888, Item #15 and by Mr. Fichtenberg in his Oct. 8, 1996 comments to FCC at JA 1008-1012. It is discussed in the DF Brief at and Reply at. The Opinion states Congress' intent to include health regulations within the FCC preemption at Opinion A

- Whether FCC was given improper delegated authority to preempt local wireless siting and operation regulations to protect the environment or the public health is discussed also JA 887-888 and at 1008-1012. The issue of whether FCC had proper delegated authority was explicitly raised in the Cellular Phone Taskforce Brief

The Second Circuit affirmed FCC's preemption

authority was properly delegated at Opinion A

- Whether the above preemption violates the 10th amendment, even when delegated to an agency with expertise in the matter was raised, for example, by Second Circuit petitioner Jerry Davis in his February 15, 1995 letter to the FCC. He said such preemption "overide(s) the 10th amendment" and that, "There is not sufficient justification for the FCC to control rulemaking and threaten the health, safety, and welfare of citizens by prohibiting reasonable regulations brought on by state and local officials." [JA 6138]. Note: Mr. Davis is now represented in the Petition for Writ of Certiorari submitted by counsels Seymour and Clines discussed above. The Opinion discusses this issue at A-??.

For the above reasons, if the Court will find in favor of the challenges raised in this petition, then I will get helpful relief.

Moreover, the harms above meet standing criteria as given in Friends of the Earth, Inc. v. Laidlaw Services (TOC) Inc. 120 S.Ct. 693, 145 L.Ed2 610

CONSTITUTIONAL AND STATUORY PROVISIONS INVOLVED

As most of the citations are lengthy, the relevant point of the statute is noted here and in the Appendix A submitted by counsels Seymour and Clines noted above, or the text is in Appendix B.

- Constitutional provisions:

  Article 1 Section 1, Article 1 Section 8, paragraph 18, Amendment One, Five, and Ten [at Appendix A-28]

  Amendment Two: A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

  Statutory and Regulatory Provisions:

- 5 U.S.C. Sec. 500
- 15 U.S.C. Sec. 2602(6): Disjunctively mentions and so distinguishes between "health" and "environment"
- 28 U.S.C sec. 1254(1)
- 29 U.S.C. 701

- 47 U.S.C. 405 see App. B
- 47 U.S.C 324 see App. B
- 40 CFR Chapter V (7-1-96 Edition) Sec. 1506.6 Public Involvement

  (a) [Agencies shall] Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

- 42 U.S.C. Sec. 2021(h): Establishes the Environmental Protection Agency as responsible for being expert on radiation matters

- 42 U.S.C. 4332 in relevant part, see A-32

- 42 U.S.C. Sec. 7412(a) subsections (6) and (7) distinguish between "hazardous pollutants" [subsection (6)] that are adverse to human health vs. "adverse environmental effects".[subsection (7)]

- 42 U.S.C. Sec. 7412(b)(2) – Describes how a list of pollutants hazardous to health is to be maintained based upon evidence they pose "a threat of adverse human health effects." And states a substance should not be on the list "solely due to its adverse effects on the environment."

- Telecommunications Act of 1996 PL 104-104, 110 Stat 56, Sec 253 [see Appendix B-??]

  and Sec. 704 [establishes 47 USC 332(c)(7),

  including FCC preemption authority in 47 U.S.C. 332(c)(7)(B)(iv)

[See Appendix A submitted by counsels Seymour and Clines, p. A-29 to A-31]

Describes local siting and land use control over cellular phone tower and related facilities, including preemption of local RF exposure regulations, and stipulates that FCC complete its NEPA rule-making on impact on the environment from RF emissions from FCC facilities.

American National Standards Institute (ANSI) C95.1-1982 and C95.1-1992 lodged with the Court

Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 8 F.C.C. Rcd. 2849, 1993 WL 757412 (1993) [Notice of Proposed Rule Making in FCC ET-Docket 93-62]

Report and Order in ET-Docket 93-62, 11 F.C.C. Rcd. 15123 (1996), and reported as notice FCC 96-326

Second Memorandum Opinion and Order in ET-Docket 93-62, and reported as notice FCC 97-303, and

Notice of Proposed Rule Making in the Matter of Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 47 U.S.C. 332(c)(7)(B)(v) of the Communications Act of 1934 as amended, FCC WT Docket 97-197 (later referred to as WT Docket 97-192

In 12 F.C.C. Rcd. 13494 (1997)

47 CFR 1.1307(b)(4)

STATEMENT OF THE CASE

BACKGROUND:

Among the early efforts of Congress to minimize adverse impacts from the strength of radio frequency (RF) radiation, a known impact then being RF interference, was its establishing the policy that

> "In all circumstances, except in case of radio communications in distress, all radio stations, including those of the United States, shall use the minimum power necessary to carry out the communications desired." [47 U.S.C. 324, established 1934] [App. B-??]

In response to an earlier statute, Regulation 24 of Sec. 54 of Title 47, which used the word "energy" instead of "power", a U.S. Attorney General opinion stated that

"[T]he Secretary of Commerce was not given the authority to determine in advance what this minimum amount should be for every case * * *" [35 Op. Atty. Gen, 126 (1926).

In 1985, for FCC to meet its National Environmental Policy Act ("NEPA"), requirements, it considered the impacts of RF radiation from the facilities of its licensees and adopted the 1982 standard for human exposure to RF radiation of the American National Standards Institute ("ANSI"), designated as ANSI C95.1-1982 ("ANSI 1982") [Second Circuit Opinion ("Opinion") at A-1. This FCC standard (now lodged with the Court) set required that,

> "Where exposure conditions are not precisely known or controlled, exposure reduction should be accomplished by reliable means to values as low as reasonably achievable."(called "ALARA") [ANSI 1982, p.11, and in AHA Brief at]

In its instructions of how to comply with ANSI 1982, called OST Bulletin No. 65, FCC noted (at page ?? of this bulletin) the ALARA requirement of ANSI 1982.

In 1986 the National Council on Radiation Protection and Measurements adopted an RF guideline, and in 1993, after ANSI revised its RF standard in 1992, FCC opened a Notice of Proposed Rule Making in ET Docket 93-62 to update its RF NEPA guidelines [Opinion A3-4]

The FCC recognized there was conflict amongst scientific organizations on what the proper RF standard should be, and made a policy decision to generally defer to the advice of the federal health agencies [Opinion A-9]. FCC issued its RF guidelines in its first final rule, Rule & Order, in August 1996 [Opinion A-4].

During the intervening 6 years FCC said that no consideration was given to public comments on how RF health studies should impact FCC RF guidelines. FCC stated this was because,

"[The] guidelines are based on recommendations of expert organizations and federal agencies with responsibilities for health and safety. It would be impractical for us to independently evaluate the significance of studies purporting to show biological effects, determine if such effects constitute a health hazard, and th[en] adopt stricter standards than those advocated by our federal health and safety agencies." [Opinion A-9].

The Opinion noted that,

> "[EPA] had been on the verge of releasing its own draft guidelines pertaining to the health effects of RF radiation in 1996. It was fully reasonable for the FCC to expect the agency with primacy in evaluating environmental impacts to monitor all

relevant scientific input into the FCC's consideration, particularly since EPA had been assigned the lead role in RF radiation health effects since 1970." [Opinion A-10].

Consistent with the FCC report and the Opinion above, EPA confirmed in a May 1999 that EPA was not asked to evaluate any of the material submitted into the above FCC docket [App. B-??] This EPA letter was sent May ??, 1999 by the Cellular Phone Taskforce counsel to the Second Circuit per Fed. Rule of App. Proc. 28(j))

In its First Order (Report & Order) FCC recognized a consensus of recommendations from its advising RF experts of the need to apply "limits for induced and contact currents as a means of controlling potentially harmful exposure to RF fields," but FCC also noted that due to measurement problems of this RF hazard that FCC would not include requirements to protect from it:

> "Although we are not adopting limits for induced and contact currents in this proceeding, we recognize the desirability for limits to be adopted in the future, particularly if more accurate measuring instruments become available." [Notice FCC 96-326, par. 147]

After its First Order was issued in August 1996, the Ad-Hoc Association and several other parties submitted, in accordance with 47 U.S.C. 405, a Petition for Reconsideration to FCC seeking specific modifications of its First Order [Opinion A-4, and see petition at JA 0869-0906 with exhibits at 0907-0974 .

There FCC found it that 'health effects' were within

the scope of 'environmental effects' and that it would apply its preemption authority as provided in 47 U.S.C. 332 (c)(7)(B)(iv). [FCC 96-326, par. 164-168].

Requests that FCC adopt the requirement that RF exposures from the facilities of its licensees be kept "as low as reasonably achievable were made [JA , JA] and noted by FCC [Notice FCC 97-303, par. #25]. FCC rejected requests for more stringent rules requested by Mr. Fichtenberg, Ad-Hoc Association, and other parties. [Notice FCC 97-303, 29-39.]

In its Second Memorandum Opinion and Order (2MOO) that appeared in notice FCC 97-303 in 12 F.C.C. Rcd. 13494 (1997), FCC left substantially unchanged its RF guideline exposure limits, including FCC not protecting from induced and contact current hazards that FCC recognized existed [see above comment on FCC 96-326, par. 147]. Recognizing its RF guidelines did not protect from this hazard, FCC nevertheless reported,

"There is no evidence to suggest that transmitters or facilities that comply with our new guidelines will cause adverse health effects." [Notice FCC 97-303, par. #111]

FCC also dismissed claims of Mr. Fichtenberg that local public health RF exposure regulations of the "operation" of FCC facilities could not be preempted by FCC. [Notice FCC 97-303, par. #78-90]

Case Before the U.S. Court of Appeals for the Second Circuit

The Second Circuit Opinion affirmed the FCC in all respects. Of particular note is the following:

- The Opinion agreed that there was no need for FCC to get advice from its advising agencies on how to re-

spond to submitted public comments and evidence that more stringent RF rules were needed. The Opinion agreed with FCC that since EPA was 'on the verge of issuing its own draft guidelines and was the federally designated expert to monitor RF matters, that FCC could rely on EPA to tell FCC if there was anything new that FCC had not already been advised about from the federal health agencies. [Opinion A10-A11].

- The Court supported [Opinion A11-A12] as within FCC discretion the FCC reversing its requirement in ANSI C95.1-1982 that RF exposure be kept as low as reasonably achievable [App. B-??].The Court also agreed that FCC's explanation that it balanced factors weighing public health risks against the desires of efficient telecommunications services was a sufficient explanation.

- The Court agreed with FCC both on its reasons for not protecting from the known hazards of induced and contact currents [Opinion A??] and also with FCC's conclusion that there was no evidence of harm if its RF exposure guidelines were followed, permitting the FCC essentially finding of no significant impacts [FONSI] if its guidelines are followed.
- The Opinion likewise agreed that Congress intended that FCC preemption authority included 'health effects' [A??] and that FCC had the authority to preempt local public health RF exposure regulation of the operation of FCC facilities.
- It said there was no 10th amendment violation because local jurisdictions were not required either to approve or deny siting permits. [Opinion A??]

REASONS FOR GRANTING THE WRIT

The first reason for granting the writ is that there are key questions of law that impact not only this decision, but have far reaching implications regarding:

- considering public comment when rule-makings are mainly based on advising expert agencies

- the vitality of formal NEPA regulations

- if federal preemption authority can be delegated to agencies who have little knowledge on the matter to be preempted (regardless of Congress's specificity of the purpose guidelines for exercising the preemption, and when the preemption touches on protecting health and safety

As our modern world becomes more technologically sophisticated and disciplines interconnected, it can be expected that federal agencies will lead rulemakings for which they are not expert and where their decisions can impact on human health and/or the environment.

In the tangled web of interagency decision making the above issues desperately need clarification.

The second reason for granting the writ is that the miracles and benefits of the wireless telecommunications revolution is on the same par as the invention of the wheel, agriculture, the machines of the industrial revolution, the car and telephone, and computers. As with these technological benefits there are also hazards.

The Opinion noted there was conflicting evidence of adverse effects [A]. Briefs will give even more evi-

dence that there is a real cause for concern for the public health. Given the enormity of the impact of this new technology on society, it is extremely important the public and business community are assured that a 'hard look' was given that assures law was properly followed when Congress and the FCC established the framework for the development and expanding of this technology over the coming decades.

It is likely for the next decade or so that there may not be another opportunity to review the rules for build-out of this technology and how it will affect the exposure of the public via cellular phones or base station facilities near homes or workplaces. Also, since the build-out is happening now, this is the most timely time to address this matter before even more is built that may later need to be changed.

With regard to the particular questions raised, please consider:

Question #1: On 'dodging public comment'

This court ruled "The agency must examine the relevant data" [Motor Vehicle Mfrs. Assn. vs. State Farm Mutual, 49 U.S. 29, 43]. When a non-expert agency depends on advising experts, then it must ask these experts for advice on how to respond to public comment, thereby providing the agency a way to "examine the relevant data." [Motor Vehicle Id. 43]

Likewise, NEPA requires, "[Agencies shall] Make diligent efforts to involve the public in preparing and implementing their NEPA procedures. [42 CFR Chapter V, 1506.??]. Clearly taking all public comment on a major element of the rule-making and 'putting it in a closed box'

without any meaningful consideration is the exact opposite of this requirement – and clearly NEPA rules anticipate non-expert agencies being advised by expert federal agencies like EPA.

If EPA were to have issued a Notice of Proposed Rule Making similar to that of FCC, EPA could not ignore all public comment questioning its decision and providing evidence for more stringent rules. EPA could not say,

"We are expert, have an unlimited budget so we can get and study all pertinent publications, and never misunderstand or overlook any important point – so we are ignoring public comment." All the more so would such agencies need to respond if they were merely "on the verge" of issuing internal draft guidelines.

So the FCC and Opinion rationale is contrary to law, and if allowed to stand could allow non-expert and expert agencies together to dodge having to respond to public comment. This is unlawful and contrary to the principles of democratic government.

Likewise, in 47 U.S.C. 405, Petition for Reconsideration, Congress explicitly provided for considering of new information by the FCC, an agency which must address rapid technological development.

Question #2: On reversing past safety regulation and Congressional policy in statute.

It is a very simple matter to verify that previous FCC RF guidelines of ANSI 1982 provided for following the "as low as reasonably achievable" (ALARA) policy and that FCC adopted this policy to apply during a transition period. 47 USC 324 described above arguably is similar, if not identical to the ALARA policy.

This Court has stated,

"[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." [Motor Vehicle Id. 42.

Moreover, FCC's reversal of its ALARA policy is arguably contrary to the policy of Congress in 47 USC 324 noted above that all radio facilities must make decisions so that the RF power they need is minimized. This is all the more reason FCC needs to explain its reversal and how it is consistent with the long-standing policy established by 47 U.S.C. 324.

Finally, the Court accepted FCC's explanation by FCC merely reciting the words that it sought " a proper balance" for protecting the public and worker health vs. efficiency of telecommunication services. [Notice 97-303, par. #2].

This Court has noted,

"[That policy making must account for uncertainty] does not imply that it is sufficient for an agency merely to recite the terms 'substantial uncertainty' as justification for its actions." [Motor Vehicles Id. 52]

Does FCC merely reciting it sought "a proper balance" also qualify a merely reciting empty phrases. For nowhere does FCC document what factors were put in its "balance", how it was done or what were the results. To verify this the Court needs merely to turn to the context of the FCC defense at Notice 97-303, par. #2.

Similarly, in the tangled-web of interagency advisors, we find the FCC and the Second Circuit Court [at A11] relied on the EPA assessment that the "[RF health' effects information is not yet sufficient to be used as an exposure criteria to protect the public against adverse human health effects [of RF]".

If EPA were to have issued its own regulations with a justification that recited "not yet sufficient information" would this Court reject this reciting as it did the term "substantial uncertainty" in Motor Vehicles above? [Id. at 52]

Can advising agencies thus recite assessment opinion without documentation, and then allow public comment to be ignored, shielding the advising agency from responding, and still having its opinion drive a rule-making decision?

EPA offered no analysis, no data, no documentation, and of course there was none for the Opinion to cite [see A11].

Does the mere reciting of "proper balance" by FCC and "not yet sufficient information" by advising EPA merit the same response of this Court as in Motor Vehicles which stated,

"unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion." [Motor Vehicles Id. 48]

Just how the Court will make requirements for actions when there is a tangled web of non-expert lead agencies relying on expert agencies is therefore in much need of resolution by this Court.

The issue chosen to examine this, whether the FCC properly reversed its ALARA policy through a "proper balance" is worthy of this Court's attention. This is because the continuance of this FCC previous policy and policy in 47 USC 324 can play a major role in driving the development of an effective wireless telecommunications infrastructure that includes the beneficial high quality service of providing products and ambient RF exposure that is as low

as reasonably achievable. This effort to minimize RF exposure may indeed be considered as one of the improvement in high quality services the Telecommunications Act of 1996 sought.

Question #3: Did FCC do a functionally equivalent NEPA? Is this even an option for agencies not expert in the health or environment matter of the rule-making?

As noted above per Question #1, NEPA requires involving the public which did not happen here – since public comment how RF health adverse effects evidence supported more stringent rules was ignored.

It is still worthwhile to note that the Opinion found as justifying the 'functional equivalent' argument the standard of the Court of Appeals for the District of Columbia. The Opinion noted that "when an agency is engaged primarily in an examination of environmental questions" and also meets other criteria, that it may meet its NEPA compliance by actions that are 'functionally equivalent' to NEPA.

The Opinion also noted that FCC has no health or environmental expertise. If agencies without acknowledged expertise in health or environment are yet found to be "engaged primarily in an examination of environmental questions" – then 'black is white', 'up is down' and the viability of Congress' policy for formal NEPA requirements is dead.

Because of the enormity of impact on the death of NEPA this decision may have, this question is also worthy of the being considered by this Court.

Question #4: Was there a proper delegation of author-

ity to FCC to preempt either environmental or health effects per 47 U.S.C. 332(c)(7)(B)(iv)?

The Supreme Court recently gave the applicability of J.W. Hampton, Jr. & Co. v. United States a new vitality when it recently cited the case in Mistretta v. United States, 488 U.S. 361 (1989). In Hampton the Court states,

"If such a power [fixing railway rates] is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject * * *" [Hampton Id. at 408]

If such is the requirement of preemption power to fix railway rates, all the more so it applies when preempting local regulations to protect public health or the environment.

This makes sense. We do not ask a computer programmer to do a heart surgery, no matter how many doctors he may consult. Only experts in a subject can best understand the information they are given, say through public comment, and how best to consider and apply it. All the more so in our technological age, must Congress delegate any preemption authority only to those who are expert on the subject.

Question #5 Are 'health effects' part of 'environmental effects?' for the purposes of FCC preemption authority in 47 U.S.C. 332(c)(7)(B)(iv).

This Petition adopts the same statements of the Case and Reasons for granting the requested writ on this question as Petitioner Michael C. Worsham in his timely filed petition on this question , and in the interests of efficiency his text will incorporated here by reference to his petition for writ in this same matter.

It should be emphasized that no doubt some members of Congress sought to preempt local health regulations through innuendo and implication by use of the more amorphous phrase 'environmental effects'. We need to call a dog "a dog" and a cat "a cat". If members of Congress intend to preempt regulations to preempt protecting the public health of their constituents, then they must do so openly and clearly, and not 'hide behind' vague terms like 'environmental effects' which in three court decisions was interpreted differently.

(1) One court said the term "environmental effects" was undefined in the above preemption section. [Freeman v. Burlington Broadcasters, Inc. 204, F3d 311 (2nd Cir. 2000] see Michael Worsham petition on section Coflicting Federal Court Decisions)

(2) One court stated that, "While it is clear from the record that the City of Moline considered potential health effects of the tower, it is less clear that they considered environmental effects." [Iowa Wireless Services, L.P.v. City of Moline, Ill. 29 F.Supp. 2d 915 (C.D. Ill, 1998).

(3) The Opinion in the instant case stated its agreement with the FCC interpretation that the statute in question preempted local regulation of RF "on the basis of the health effects of RF radiation." [Opinion A5]. As noted by Mr. Worsham, while federal agencies have discretion to imply meaning to vague phrases, this discretion is curbed when the Act establishing the statute forbids implied preemption, as does Sec. 601. Also this Court has curbed agency discretion to imply preemption of local health and safety regulations, and instead has insisted on a higher standard where Congress must explicitly preempt.

> "As a matter of statutory construction, congressional intent to displace local laws in the exercise of

the commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuassive of the statutory purpose. This is especially the case when public safety and health are concerned." [Mauer vs Hamilton, 309 U. S. 598, 614; 84 L.Ed 969, 980]

"Where . . . the field that Congress is said to have preempted has been traditionally occupied by the States 'we start with the assumption that the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." [Hillsborough County v. Automated Medical Labs, 471 U.S. 707; 85 L. Ed. 2d 714, 722 (1985)

Although federal courts may disagree how to apply law, which a higher court may resolve, here we have examples of courts disagreeing on what a word. This is clear evidence that meets the standard that,

"A statute will be held void for vagueness if the conduct forbidden by it is so unclearly defined that persons of common intelligence must necessarily guess at its meaning and differ as to its application."

[Connally v. General Construction Co. 285 U.S. 385]

"Regulation is void for vagueness if it is so indefinite that ordinary people cannot understand that which it prohibits." [Pro-choice Network v. Schenck, 67 F.3d 359, vacated in part on rehearing en banc 67 F3d 377, certiorari granted 116 S.Ct. 1260, 134 L.Ed. 2d 209, affirmed in part, reversed in part 117 S.Ct. 855, 137 L.Ed 2d. 1.]

"Regulation is unconstitutionally vague if it fails to

give a person of ordinary intelligence reasonable opportunity to know what is prohibited." [Thomas v. Hinson, 74 F3d. 888 (8th Circuit, 1996]

Moreover, when we look at the legislative record, we see enough signs and 'muddy waters' so that the required 'clear intent' of Congress is missing. Specifically:

- Congress did not preempt the entire field of RF exposure control as some parties wanted, but only of 'personal wireless services.'
- As we move from the House version of the preemption to the Joint House/Senate compromise Conference Report, we find a clear move away from preempting local public health regulations.

Specifically, The House Report sought "uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible." [H. Rep. 104-204, 104th session 94-95 (1995).

However, in the Joint Senate House Conference report all mention of health and safety was removed. Thus, the intelligible principle for preemption in the House Report was removed – with nothing to take its place except that FCC should finish its NEPA rule-making. This only required the FCC to consider environmental impacts, but gave no intelligible principle on how to apply its findings for decision making.

Question #6: Did the FCC preemption violate the 10th amendment due to commandeering the states and local jurisdictions to run a federal program?

Choice ends where liability begins.

In New York vs United States 505 U.S. 144 (1992) this Court decided that when a party has either the option of being forced to run a federal program or take on a liability (title to nuclear waste) then the result is commandeering of state or local government. In Petersburgh Cellular Partnership v. Board of Supervisors, 205 F.3d 688 (4th Cir. 2000) Circuit Judge Niemeyer explained the disastrous consequences of a jurisdiction abandoning the field of zoning and permitting wireless telecommunications facilities. Moreover, not only would there be a high risk for a deterioration neighbor quality of life and consequent property value, but also of danger to life and property due to falling towers or, more likely, electrical fire due to not inspected electrical systems. Since such dangers of risk to property are so obvious and there is no benefit to the community by so abandoning, that any jurisdiction that reverses its present course of zoning and permitting such facilities puts itself at liability risk [see extensive discussions in Owen v. City of Independence, 445 U.S. 622 (1980); Paratt v. Taylor 451 U.S. 527 (1981) and City of Canton v. Harris, 489 U.S. 378 (1989) discussing 'deliberate indifference'. Thus, the typical immunity that local jurisdictions enjoy when making policy decisions is lost when the dangers are clear and the benefits nil from abandoning zoning and permitting of wireless facilities.

Such lack of real choice amounts to de facto commandeering. Moreover, since there is no federal zoning and permitting program the following applies:

"In view of the efforts of governmental bodies everywhere to mitigate the destruction of life, limb, and property resulting from the use of motor vehicle, it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal meas-

ure found suitable to put in its place. H.P. Welch Co. v. New Hampshire, 306 U.S. 79-85 83 L.Ed 500 at 505.

Also consider Printz v. United States, 521 U.S. 898 (1997). It would have made no difference in the Supreme Court's decision had Congress passed an act of slightly different wording – such as that the States were commanded, that "if they had a Chief Law Enforcement Officer (CLEO), then the Brady Act requirements (found unconstitutional) would be required.

Would the Second Circuit say there is a choice to abandon law enforcement to avoid the act's requirement if there is a CLEO and so there is no real commandeering? Such abandonment of law enforcement is no real choice. The Second amendment notes that a militia is "necessary to the security of a free State." [App. B-??]. Just as the chaos due to no law enforcement endangers the security of a free State, so too would the chaos that Judge Niemeyer describes.

There are examples of many court cases where federal district and appellate court decisions that find local jurisdictions applied RF health considerations more stringent than those of the FCC and so denied a permit – and provided relief by compelling the permits be issued.

See Cellular Telephone Co. v. Town of Oyster Bay, 166 F.3d 490 (2nd Cir. 1999); Iowa Wireless Services, L.P. v. City of Moline, Ill. 29 F.Supp. 915 (C.D.Ill 1998); Omnipoint Corp. v. Zoning Hearing Bd. Of Pine Grove, TP 20 F.Supp. 2d 875, 881-92 (E.D. Pa. 1998); Illinois RSA No. 3 v. County of Peoria, 965 F. Supp. 732, 747, (C.D. Ill. 1997); BellSouth Mobility Inc. v. Gwinnett County Georgia, 944 F. Supp. 923, 929 (N.D. 1996).

One would think in such case, the Court might rule the jurisdiction's denial void and to either: (1) allow the wireless facility to be constructed without any governmental supervision, as the Opinion suggests is the 'choice' of local jurisdictions. But, as noted this is no real choice that any responsible person could make, and of course including the courts.

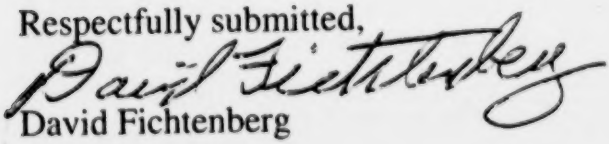
Or the courts might designate a federal agency to run a federal program to review the zoning and permit issues, assuring safe construction, etc.

But, as Seymour and Clines show, the courts have compelled the local jurisdictions to issue the permits, and allows the federal government to stand back while local officials are commandeered and take the anger of their constituents. This is exactly what New York and Printz said was unconstitutional commandeering.

Conclusion:

For the above reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,



David Fichtenberg

Date: September 13, 2000

APPENDIX B

15 U.S.C. Sec. 2602(6):

> The term "health and safety study" means any study of any effect of a chemical substance or mixture on health or the environment or both, including underlying data and epidemiological studies of occupational exposure to a chemical substance or mixture, toxicological clinical, and ecological studies of a chemical substance or mixture, and any test performed pursuant to this chapter.

42 U.S.C. Sec. 2021(h):

Consultative, advisory, and miscellaneous functions of Administrator of Environmental Protection Agency. The Administrator of the Environmental Protection Agency shall consult qualified scientists and experts in radiation matters, including the President of the National Academy of Sciences, the Chairman of the National Committee on Radiation Protection and Measurement, and qualified experts in the field of biology and medicine and in the field of health physics. The Special Assistant to the President for Science and Technology, or his designee, is authorized to attend meetings with, participate in the deliberations of, and to advise the Administrator. The Administrator shall advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards and in the establishment and execution of cooperation with States. The Administrator shall also perform such other functions as the President may assign to him by Executive order.

42 U.S.C. Sec 7412(a) subsections (6) and (7)

(6) Hazardous air pollutant. The term ``hazardous air pollutant'' means any air pollutant listed pursuant to subsection (b) of this section.

(7) Adverse environmental effect The term ``adverse environmental effect'' means any significant and widespread adverse effect, which may reasonably be anticipated, to wildlife, aquatic life, or other natural resources, including adverse impacts on populations of endangered or threatened species or significant degradation of environmental quality over broad areas.

42 U.S.C. Sec. 7412(b)(2):

(2) Revision of the list The Administrator shall periodically review the list established by this subsection and publish the results thereof and, where appropriate, revise such list by rule, adding pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise, but not including releases subject to regulation under subsection (r) of this section as a result of emissions to the air. No air pollutant which is listed under section 7408(a) of this title may be added to the list under this section, except that the prohibition of this sentence shall not apply to any pollutant which independently meets the listing criteria of this paragraph and is a precursor to a pollutant which is listed under section 7408(a) of this title or to any pollutant which is in a

class of pollutants listed under such section. No substance, practice, process or activity regulated under subchapter VI of this chapter shall be subject to regulation under this section solely due to its adverse effects on the environment.

Telecommunications Act of 1996, PL 104-104

To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies. [from Introduction]

47 U.S.C. Sec. 253(b):

State regulatory authority: Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

47 U.S.C. 324 Use of Minimum Power

In all circumstances, except in case of radio communications or signals relating to vessels in distress, all radio stations, including those owned and operated by the United States, shall use the minimum amount of power necessary to carry out the communications desired.

47 U.S.C. Sec. 332(c)(7)(B)(iv) (established by the Telecommunications Act of 1996, Sec. 704):

No state or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless services facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

47 U.S.C. 405 Petition for Reconsideration; procedure; disposition of time of filing; additional evidence; time for disposition for reconsideration of order concluding hearing or investigation; appeal of order

47 U.S.C. 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order.

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any

manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of. (b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying

such petition. (2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

Telecommunications Act of 1996, Sec. 601(c):

Federal, State, and Local Law. – (1) No implied effect. – This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

APPENDIX C – Letters and Miscellaneous Documents

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C.
May 19, 1999

Office of
Air and Radiation

Arthur Firstenberg
President, Cellular Phone Taskforce
Post Office Box 100404
Vanderveer Station
Brooklyn, New York 11210

Dear Mr. Firstenberg,

I am writing in response to your letter of May 10, 1999, in which you asked whether the Environmental Protection Agency (EPA) has ever received a request from the Federal Communications Commission (FCC) asking EPA to evaluate, with regard to health implications of exposure to radiofrequency radiation, the documents that exist in the FCC's Notice of Proposed Rulemaking of April 1993, or after the final rule was issued in August 1996.

To my knowledge, the FCC has not asked EPA to review and evaluate any of the materials in the FCC's docket ET-93-62, other than the April 1993 Notice of Proposed Rulemaking (NPRM), Guidelines for Evaluating the Environmental Effects of Radiofrequency 1993 letter from Margo T. Oge, Director of Radiation and Indoor Air, to

Thomas P. Stanley, Chief Engineer, Office of Engineering and Technology. EPA's November 1993 comments are appended.

I hope that this information has been responsive to your letter.

Sincerely yours,

/s/ Norbert N. Hankin

Norbert N. Hanking

Environmental Scientist – Radiation

Office of Radiation and Indoor Air (6604J)

App. C-2

STATE OF WASHINGTON
SECRETARY OF STATE

I., Ralph Numro, Secretary of State of the State of Washington and custodian of its seal, hereby issue this

CERTIFICATE OF EXISTENCE/AUTHORIZATION

OF

AD-HOC ASSOCIATION OF PARTIES CONCERNED ABOUT THE FEDERAL COMMUNICATIONS COMMISSION'S RADIO FREQUENCY RADIO FREQUENCY HEALTH AND SAFETY RULES.

I FURTHER CERTIFY that the records on file in this office show that the above named nonprofit corporation was formed under the laws of the State of Washington and was issued a Certificate of Incorporation in Washington on June 6, 1997.

I FURTHER CERTIFY that as of the date of this certificate, no Articles of Dissolution have been filed, and that the corporation is duly authorized to conduct affairs in the corporate form in the State of Washington.

| SEAL of the | Date: September 12, 2000

| State of Washington|
|_____|

Given under my hand and the seal of the State of Washington at Olympia, the State Capitol

By /s/ Ralph Munro
Ralph Munro, Secretary of State